IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

WRIT PETITION NO.757 OF 2002

WITH

WRIT PETITION NO.1805 OF 2002

M/s.Goolamally Hasanjee ..Petitioners.

Vs.

The Municipal Corporation of

Greater Mumbai & Ors. ..Respondents.

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Mr.R.A.Thorat with Mr.N.M.Shah for the Petitioners.

Mrs.A.R.Joshi for the BMC- Respondent Nos.1 and 2.

Mr.Shekhar Ingawale, AGP for the State - Respondent No.3.

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**CORAM : DR.D.Y.CHANDRACHUD, J.**

17th March, 2005.

P.C. :

1. Writ Petition 1805 of 2002 is not on Board. By consent of parties the aforesaid petition is also taken on Board for hearing and final disposal.

2. The Petitioners claim to be the owners in respect of a plot of land together with a building thereon situated at 74/80, Sherif Devji Street comprised in City Survey No.747, Mandvi Division in 'B' ward of the Municipal Corporation. The Municipal Corporation issued two notices under Section 351 of the Mumbai Municipal Corporation Act, 1888 on 11th August, 1992 and 4th September, 1992. The first notice was for the unauthorized reconstruction of a building comprising of a ground floor and three upper floors, whereas the second notice was for the unauthorized construction of the 4th, 5th and 6th floors of the building. These notices were challenged in a suit before the City Civil Court in which a reference was made to the Deputy Municipal Commissioner to adjudicate upon the matter. In pursuance thereof the Deputy Municipal Commissioner passed an order of demolition on 19th October, 1993. A fresh suit is stated to have been instituted before the City Civil Court and on 29th August, 2000 the Deputy Municipal Commissioner again passed an order.

3. The Deputy Municipal Commissioner noted that an application was made for repair permission and plans for repairing the building were approved by the Executive Engineer, Building Proposals on 8th July, 1983. In the approved plan, the existing building was stated to consist of a ground and three upper floors. The order of the Deputy Municipal Commissioner noted that the cadastral survey sheet No.747 of Mandvi Division of 1979 showed a building consisting of only a ground floor and three upper floors. On consideration of the entire material before him, the authority held that repair permission was sought in respect of a building which consisted of a ground floor and three upper floors and that in the guise of carrying out repairs, the entire building had been demolished and reconstructed so as to consist of a ground floor and six floors. The Deputy Municipal Commissioner was of the view that it would be appropriate to permit the Petitioners to apply for regularization of the ground floor and three upper floors, but that the 4th, 5th and 6th floors were in any event unauthorized in the absence of any authentic proof to show the existence of these three floors prior to the datum line of 1st April,

1962. Liberty was, therefore, granted to the Petitioners to move the Executive Engineer, Building Proposals to get the ground floor and the three upper floors regularized. The 4th, 5th and 6th floors were directed to be removed on the ground that they could not be regularized under the Development Control Rules.

4. It appears that thereafter a suit was filed before the City Civil Court (L.C.Suit No.6329 of 2000) by the tenants of the 4th, 5th and 6th floors. The Motion for interim relief having been rejected by the City Civil Court, an Appeal from Order was filed before this Court in which the Court was informed that the Appellants before the Court there sought to pursue an application for regularization which was pending before the Executive Engineer, Building Proposals. The Appeal from Order was accordingly disposed of in the light of the aforesaid statement. It would appear that on 12th December, 2000 an application for regularization of the entire structure was submitted by the architect which was rejected on 4th January, 2001. Some time in May 2001, the 4th, 5th and 6th floors are stated to have been

demolished by the Municipal Corporation. Eventually, the impugned order dated 24th December, 2001 was passed by the Executive Engineer, Building Proposals by which an amount of Rs.62,65,780/- was demanded as penalty (at double the rate for regularization), an amount of Rs.4,46,700/- was demanded for deficiency in open space and an amount of Rs.6,06,705/-- towards the cost incurred for demolishing the 4th, 5th and 6th floors. The Executive Engineer has also directed the Petitioners to demolish the third floor of the building.

5. When this Petition came up for admission on 16th April, 2002, this Court (Coram : R.J.Kochar, J.) granted an interim order in terms of prayer clauses (c) and (d) staying the implementation of the impugned order dated 24th December, 2001 and further demolition subject to the Petitioners depositing an amount of Rs.36,59,650/-.

6. In reply to the Petition, an affidavit has been filed by the Assistant Engineer in which it has been stated that the Executive Engineer, Building Proposals has a taken a decision on 24th December,

2001 to regularize the ground floor, the mezzanine floor and two upper floors. In paragraphs 7 and 8 of the affidavit in reply the following statements have been made :

> "7. I say that as per the particulars and policy framed by these Respondents, the unauthorized construction which is beyond approved plans is being regularized on charging the 15% land rate. I say that in the instant case, the Petitioners carried out unauthorized construction without submitting any plans and, therefore, these Respondents have charged double the rate of work done without approval or approvable. As regards to other conditions, the Petitioners have not made any grievance in the Writ Petition. I say that the Petitioners have complained about charging premium at the double rate as stipulated in clause (5) of the said decision dated 24.12.2001.
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> 8. I say that the Director (E.S. & P.) of the Respondents issued a circular dated 2.2.2002 informing the concerned officers that

> the work if any carried out beyond approval shall be put up for regularization to the undersigned if the same is approvable and penalty at double the amount of present penalty should be levied for regularization. I crave leave to refer to and rely upon the said circular as and when produced."

7. The affidavit of the Assistant Engineer is totally vague. Paragraph 6 of the affidavit adverts to the existence of a mezzanine floor to the existence of which there appears no prior reference in any of the orders passed by the municipal authorities or in the record before the Court. The affidavit is silent in regard to the "particulars and policy" framed by the Municipal Corporation and no details thereof have been furnished. The Assistant Engineer states that the Municipal Corporation has charged double the rate of work done "without approval or approvable". In paragraph 8 there is a reference to a circular dated 2nd February, 2002 issued by the Director (E.S. & P.). The impugned order was passed on 24th December, 2001 and obviously it cannot be supported with reference to a circular which came

later on 2nd February, 2002. The Executive Engineer has, in my view, passed the order dated 24th December, 2001 without a proper consideration or application of mind.

8. The facts of the present case make disturbing reading. The order of the Deputy Municipal Commissioner dated 29th August, 2000 shows that repair permission was initially sought and in the guise of repairs, the existing structure came to be demolished and a new building consisting of a ground floor and six floors was constructed. In the order dated 29th August, 2000 there is no reference to the existence of a mezzanine floor. The order was that at the highest, the claim for regularising the ground floor and three floors could be considered if any application was made. It transpires that there is in addition a mezzanine floor so that even after demolition of the 4th, 5th and 6th floors, what is in existence is a structure consisting of a ground floor, mezzanine floor, first floor, second floor and third floor. Surely, it is to be expected that the municipal authorities must show a greater application of mind before they proceed to regularize structures such as in the

present case. The whole exercise appears to have been carried out in a casual manner and the affidavit in reply which has been filed on behalf of the Municipal Corporation betrays a complete lack of awareness of the solemn duty which is cast upon the planning authority to observe compliance of planning laws. The impugned order also proceeds to condone the deficiency in open space in a most casual manner. On this state of the record, the Court is constrained to set aside the impugned order dated 24th December, 2001 in order to facilitate a fresh consideration of the matter. On remand, having regard to the circumstances which have been narrated in the earlier part of this order, it would be necessary to direct that the Municipal Commissioner shall personally give a hearing to the Petitioners and pass fresh orders in accordance with law. The restoration of the matter before the Municipal Commissioner for fresh decision shall not be construed as any acceptance by this Court of the lawfulness of the mezzanine floor and it would be open to the municipal authorities to take such action in accordance with law as they are advised.

9. The parties are directed to appear before the Municipal Commissioner for directions on 28th March, 2005 at 12.00 noon on which date the Municipal Commissioner shall fix a time schedule for the expeditious disposal of the proceedings. The Municipal Commissioner shall arrive at a final determination on or before 15th May, 2005.

10. The amount which has been deposited with the Municipal Corporation in pursuance of the interim order dated 16th April, 2002 shall continue to remain in deposit with the Corporation and will abide by such final directions as may emerge upon the order of the Municipal Commissioner.

11. Both the Petitions are disposed of in the aforesaid terms.